

## REMARKS

The Examiner and the Applicants' representative discussed this application on 16 October 2006, and the Examiner recommended filing of this Response in order to have the Applicants' arguments considered prior to filing a Notice of Appeal or Request for Continued Examination. The representative respectfully submits the following.

Claims 1-25 are pending. All pending claims stand rejected under 35 U.S.C. §102(e) as being anticipated by Pehlke et al. (US 2005/0032488 A1) (hereinafter, Pehlke). It is respectfully submitted that Pehlke does not qualify as prior art under 35 U.S.C. §102(e). Further, while Pehlke is a continuation-in-part of U.S. Patent Application Serial No. 09/813,593, now U.S. Patent No. 6,785,521, by Hadjichristos et al., the Examiner rejects the claims of the instant application by using new matter in Pehlke. The new matter in Pehlke does not derive the benefits of the filing or other dates of Hadjichristos and therefore the Examiner is using material in Pehlke that does not qualify as prior art under 35 U.S.C. §102(e).

35 U.S.C. §102(e) states the following:

the invention was described in — (1) *an application for patent*, published under section 122(b), by another *filed* in the United States before the invention by the applicant for patent or (2) *a patent granted* on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language;

35 U.S.C. §102(e) (March 2006) (emphases added). Section (2) of 35 U.S.C. §102(e) relates to a granted patent, and Pehlke is not a granted patent. Therefore, section (2) is inapplicable to Pehlke. Section (1) of 35 U.S.C. §102(e) states that an application may fall under this section if the application (i) has been published under §122(b), (ii) is by another and (iii) was filed in the United States *before* the invention by the Applicant. Applicants' date of invention is — by definition — at least the date of filing the application, which is **29 August 2003**. By contrast, Pehlke was filed on **12 July 2004**.

As Pehlke's date of filing (12 July 2004) is *after* the Applicants' date of filing (29 August 2003), Pehlke does not qualify as prior art under 35 U.S.C. §102(e). It should also be noted that Pehlke does not qualify as prior art under any other section of 35 U.S.C. §102.

As stated above, Pehlke is a continuation-in-part of U.S. Patent Application Serial No. 09/813,593, now U.S. Patent No. 6,785,521, by Hadjichristos et al. (hereinafter, Hadjichristos). Hadjichristos issued on 31 August 2004, but was published on 26 September 2002 as U.S. Patent Application No. 2002/0137480 A1. The Examiner contends that Pehlke has a "priority date" of the filing date of Hadjichristos.

However, Applicants have compared Pehlke and Hadjichristos and have determined that at least paragraphs [0060]-[0083] and [0094] and FIGS. 10-14 of Pehlke include new matter as compared to Hadjichristos. These paragraphs therefore receive the filing date of Pehlke and do not receive benefit of the earlier filing or other dates associated with Hadjichristos. These paragraphs will be referred to herein as the "new matter paragraphs".


In the outstanding final Office Action, dated 16 May 2006, the Examiner uses at least the new matter paragraphs [0060], [0064]-[0066], [0079]-[0082] of Pehlke to reject independent claims 1, 9, 17, 20, and 21. Certain of the dependent claims are also rejected using the new matter paragraphs of Pehlke. For instance, the Examiner uses new matter paragraphs [0072] and [0073] to reject dependent claims 2 and 10 and uses new matter paragraph [0060] to reject dependent claims 3 and 11.

Pehlke does not qualify as prior art against the instant application under 35 U.S.C. §102(e). Although some of the subject matter in Pehlke appears to be disclosed in Hadjichristos, the Examiner in the final Office Action uses at least some of the new matter paragraphs from Pehlke to reject the claims herein, where the new matter paragraphs do not receive benefit of the earlier filing or other dates associated with Hadjichristos.

Consequently, Applicants respectfully submit that the outstanding rejections using Pehlke under 35 U.S.C. §102(e) are incorrect. These rejections should be withdrawn.

Applicants respectfully request that, if the Examiner wishes to assert Hadjichristos against the application, that specific rejections to Hadjichristos be articulated in a further rejection. It is also noted that Applicants respectfully incorporate all previous arguments regarding Pehlke by reference and submit that Pehlke does not anticipate the claimed subject matter.

Respectfully submitted:

  
\_\_\_\_\_  
Robert J. Mauri  
Reg. No.: 41,180

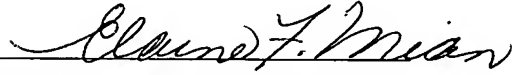
10/16/06  
\_\_\_\_\_  
Date

Customer No.: 29683

HARRINGTON & SMITH, LLP  
4 Research Drive  
Shelton, CT 06484-6212  
Telephone: (203)925-9400  
Facsimile: (203)944-0245  
email: [rmauri@hspatent.com](mailto:rmauri@hspatent.com)

#### CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Patents, P.O. BOX 1450, Alexandria, VA 22313-1450.

  
\_\_\_\_\_  
Name of Person Making Deposit

10/16/06  
\_\_\_\_\_  
Date